



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

IAN A. BOWLES
Secretary

LAURIE BURT
Commissioner

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 15, 2008

In the Matter of
Abrasive Blasting & Coatings, Inc.

Docket No. 2008-061
DEP File No. UAO-CE-08-7001

FINAL DECISION
DISMISSING APPEAL

INTRODUCTION

Under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may summarily dismiss [an appeal] *sua sponte*," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(10)(e).¹

In this case, I am dismissing the appeal of Abrasive Blasting & Coatings, Inc. ("the

¹ Under 310 CMR 1.01(5)(a)15, Presiding Officers may "prescreen appeals and determine their potential amenability to settlement through alternative dispute resolution and early resolution through motions to dismiss." The prescreening authority of Presiding Officers also includes the power to "issu[e] orders to [the] parties [to the appeal], including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." 310 CMR 1.01(5)(a)15.

Under 310 CMR 1.01(10)(e), a Presiding Officer may "dismiss[s] [an] appeal as to some or all of the disputed issues" where the appellant fails to comply with a Presiding Officer's order, fails to prosecute an appeal, or "demonstrates an intention to delay the proceeding[s] or resolution of the proceedings" in an appeal.



petitioner”) because it has failed to comply with my March 26, 2008 order (“March 26th Order”) directing it to satisfy its pleading obligations under 310 CMR 1.01(6)(b) by filing a More Definite Statement with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) by April 7, 2008.² The petitioner has not filed any response to my March 26th Order, and the deadline for filing a response expired more than seven days ago.

PRIOR APPELLATE PROCEEDINGS

On March 7, 2008, OADR received a “Fee Transmittal Form-Request for Adjudicatory Appeal” from the petitioner, which referred to DEP File No. UAO-CE-08-7001 and nothing more. See March 26th Order, at pp. 1-2. The petitioner’s referral to that file suggested that the petitioner was appealing a Unilateral Administrative Order (“UAO”) issued by the Department. Id. The petitioner, however, failed to include a copy of the UAO with its appeal and did not file a pleading satisfying the requirements of 310 CMR 1.01(6)(b). Id.

The regulation provides that:

[t]he notice of claim for adjudicatory appeal shall state specifically, clearly and concisely [1] the facts which are grounds for the appeal, [2] the relief sought, and [3] any additional information required by applicable law or regulation. . . . A

² OADR is separate and independent of MassDEP’s program offices, Regional Offices, and Office of General Counsel (“OGC”). OADR is staffed by a Case Administrator, an Administrator of Alternative Dispute Resolution (“ADR”), and Presiding Officers. A Chief Presiding Officer, who reports to MassDEP’s Commissioner, supervises Presiding Officers and other OADR staff.

Presiding Officers in OADR are experienced attorneys at MassDEP appointed by MassDEP’s Commissioner to serve as neutral hearing officers, and are responsible for facilitating settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. See 310 CMR 1.01(1)(a); 310 CMR 1.01(1)(b); 310 CMR 1.01(5)(a)15. Under 310 CMR 1.03(7), Ex Parte communications between OADR’s Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited and all MassDEP staff involved in the appeals process are informed of these requirements. Additionally, Recommended Final Decisions of Presiding Officers in appeals are subject to review by MassDEP’s Commissioner pursuant to 310 CMR 1.01(14). Under the regulation, the Commissioner may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision. All Final Decisions are subject to judicial review pursuant to G.L. c. 30A, § 14. These provisions ensure that the appeal process at MassDEP will be fair and will result in unbiased decision-making.

person filing a notice of claim shall include a copy of the document being appealed. . . .

310 CMR 1.01(6)(b) (emphasis and numerical references supplied). If an appellant fails to comply with the pleading requirements of 310 CMR 1.01(6)(b) or any other applicable regulations:

the Presiding Officer shall dismiss the appeal or require a more definite statement. If the person filing the notice of claim fails to file a more definite statement within the period specified, the appeal shall be dismissed.

310 CMR 1.01(6)(b).

As a result of the petitioner's pleading deficiencies, on March 26, 2008, I ordered the petitioner to file a more definite statement to meet its pleading obligations under 310 CMR 1.01(6)(b). See March 26th Order, at pp. 2-3. Specifically, I ordered the petitioner to file with OADR by April 7, 2006:

- (1) a clear and concise statement of the facts which are the grounds for the petitioner's its appeal of the UAO;
- (2) a statement of the relief that the petitioner seeks in the appeal;
- (3) a denial of the facts alleged by the Department in the UAO; and
- (4) a complete copy of the document being appealed— the UAO.

Id.

ORDER

My March 26th Order made clear that I would dismiss the petitioner's appeal pursuant to 310 CMR 1.01(5)(a)15.f.vi; 310 CMR 1.01(6)(b); and 310 CMR 1.01(10), if the petitioner failed to file a more definite statement by April 7, 2008 satisfying the pleading requirements of 310 CMR 1.01(6)(b). See March 26th Order, at p. 3. As of this date, April 15, 2008, the petitioner

has not filed any response with OADR to my March 26th Order. Accordingly, this appeal is dismissed pursuant to 310 CMR 1.01(5)(a)15.f.vi; 310 CMR 1.01(10)(e); and 310 CMR 1.01(11)(a)2.f due to the petitioner's failure to comply with my March 26th Order.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Final Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Final Decision. Any party may appeal this Final Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Final Decision.

All submittals in this case shall be filed with Anne Hartley, OADR's Case Administrator, at One Winter Street, 2nd Floor, Boston, MA 02108 and served on the other parties in the case (identified on the attached service list) pursuant to 310 CMR 1.01(4)(f).

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Date: _____

Salvatore M. Giorlandino
Acting Chief Presiding Officer

SERVICE LIST

In the Matter of
Abrasive Blasting & Coatings, Inc.

Docket No. 2008-061
DEP File No. UAO-CE-08-7001

Representative

Party

Travis W. Peltier, President
Abrasive Blasting & Coatings, Inc.
41P Sutton Lane
Worcester, MA 01603

PETITIONER, pro se

Robert Ritchie,
Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108

DEPARTMENT

cc: Mary Jude Pigsley,
Chief Regional Counsel
MassDEP/Central Regional Office
627 Main Street
Worcester, MA 01608

DEPARTMENT

Date: April 15, 2008